BYG Architecture Sdn Bhd v Menteri Kewangan Malaysia

HIGH COURT (SHAH ALAM) — APPLICATION FOR JUDICIAL REVIEW NO BA-25–86–12 OF 2022
SHAHNAZ SULAIMAN J
22 AUGUST 2023

Civil Procedure — Judicial review ('JR') — Leave application — Whether Minister's non-response to applicant's letter did not amount to 'decision' that was judicially reviewable — Applicant in letter had given Minister one week to issue directions to Director-General of Inland Revenue ('DGIR') under s 135 of Income Tax Act 1967 ('ITA') to exempt applicant from complying with notices of additional assessment — Applicant had also requested Minister himself to exempt it from paying the additional tax under s 127(3A) of ITA — Whether Minister was under no legal or public duty to comply with applicant's requests — Whether no order of mandamus could be issued against Minister compelling him to comply with aforesaid provisions of ITA — Whether JR application was premature as applicant had not exercised its right of appeal under the ITA against the additional assessments

The Director-General of Inland Revenue ('DGIR') had issued notices of additional assessment ('Forms JA') to the applicant ('BYG') to pay tax due and payable on certain years of assessment. Dissatisfied with the DGIR's action, BYG wrote a letter to the respondent requesting him to give directions to the DGIR under s 135 of the Income Tax Act 1967 ('the ITA') to exempt BYG from complying with the Forms JA. In the same letter, BYG also requested the respondent to exercise his powers under s 127(3A) of the ITA to exempt BYG from having to pay the tax under the Forms JA. When BYG did not receive any reply from the respondent within the one-week timeframe stated in the letter, it construed the non-response as a 'decision' and filed the instant application for leave to apply for judicial review ('JR') of the 'decision'. The relief that BYG sought in its proposed JR application was, inter alia, for an order of mandamus against the respondent directing him to exercise his powers under s 135 and/or s 127(3A) of the ITA as aforesaid on the grounds that the Forms JA were ultra vires, illegal, void, unlawful, made in excess of authority and without regard to BYG's legitimate expectations and irrational and unreasonable. The Attorney-General objected to the leave application on the grounds that: (a) the respondent had not made any decision or committed any act or omission that was amenable to JR; (b) the failure to name the DGIR as a party rendered the proceedings frivolous and vexatious; (c) BYG had not established any legal duty to act on the part of the respondent in order for the court to issue an order of mandamus against him; (d) ss 135 and 127(3A) of the ITA could not be invoked by the applicant to set aside the Forms JA; and (e) BYG's resort to JR

was premature as it had not exercised its right of appeal under the ITA.

Held, dismissing the leave application:

(1) BYG deemed that the respondent had made a decision when it received no reply within the deadline it imposed in its letter. Based on case law, there had to be clear evidence of a refusal to act. In the instant case, BYG had imposed a legal duty on the respondent to make a decision when there was no such duty on the respondent under s 135 of the ITA. Therefore, the respondent's non-response to BYG's letter did not amount to a decision that was amenable to judicial review (see paras 12 & 15–17).

(2) The court did not agree that the leave application was frivolous and vexatious just because the DGIR was not made a party to the proceedings. The court was satisfied that the JR application was made against the respondent's 'decision' not to reply or respond to BYG's letter (see paras 19 & 21).

(3) Section 135 of the ITA did not impose a legal duty on the respondent to set aside the DGIR's notices of assessment under the ITA. Hence, BYG could not seek an order of mandamus to compel the respondent to do so (see para 27).

(4) Section 135 of the ITA provided that the Minister may give to the DGIR directions of a general character that were not inconsistent with the ITA, whilst s 127(3A) of the ITA allowed the Minister to exempt any person from all or any provision of the ITA, either generally or in respect of any income of a particular kind or any class of income of a particular kind. Both those sections gave the Minister discretion in matters pertaining to tax generally. However, they did not, in the court's view, allow the Minister to exempt a tax payer from paying tax that was due and payable as and when the Minister pleases. If such a situation came into being, it would create chaos to the whole taxation legislative framework. It would be pointless for the DGIR to issue notices of assessments if the Minister could easily exempt the tax payer from complying with them (see paras 30, 32 & 35).

(5) BYG's JR application was premature as it had a right of appeal under s 99 of the ITA to challenge the Forms JA issued by the DGIR. The law provided for the avenue of appeal to the Special Commissioners of Income Tax under s 99 of the ITA to be exhausted first (see paras 37 & 41).

[Bahasa Malaysia summary

Ketua Pengarah Hasil Dalam Negeri ('KPHDN') telah mengeluarkan notis taksiran tambahan ('Borang JA') kepada pemohon ('BYG') untuk membayar cukai yang perlu dibayar dan kena dibayar pada tahun taksiran tertentu. Tidak

berpuas hati dengan tindakan KPHDN, BYG menulis surat kepada responden meminta beliau memberi arahan kepada KPHDN di bawah s 135 Akta Cukai Pendapatan 1967 ('ACP') untuk mengecualikan BYG daripada mematuhi Borang JA. Dalam surat yang sama, BYG juga meminta responden menggunakan kuasanya di bawah s 127(3A) ACP untuk mengecualikan BYG daripada perlu membayar cukai di bawah Borang JA. Apabila BYG tidak menerima sebarang jawapan daripada responden dalam tempoh masa seminggu yang dinyatakan dalam surat itu, ia menganggap ketidakjawaban itu sebagai 'keputusan' dan memfailkan permohonan segera untuk kebenaran memohon semakan kehakiman ('JR') bagi 'keputusan' itu. Relif yang diminta BYG dalam permohonan JR yang dicadangkan adalah, antara lain, untuk perintah mandamus terhadap responden yang mengarahkannya untuk menjalankan kuasanya di bawah s 135 dan/atau s 127(3A) ACP seperti yang dinyatakan di atas atas alasan bahawa Borang JA adalah ultra vires, menyalahi undang-undang, batal, tidak sah, dibuat melebihi kuasa dan tanpa mengambil kira jangkaan sah BYG dan tidak rasional dan tidak munasabah. Peguam Negara membantah permohonan kebenaran tersebut atas alasan bahawa: (a) responden tidak membuat apa-apa keputusan atau melakukan apa-apa tindakan atau peninggalan yang boleh dipinda oleh JR; (b) kegagalan untuk menamakan KPHDN sebagai pihak telah menyebabkan prosiding tersebut remeh dan menyusahkan; (c) BYG tidak mewujudkan sebarang kewajipan undang-undang untuk bertindak di pihak responden agar mahkamah mengeluarkan perintah mandamus terhadapnya; (d) ss 135 dan 127(3A) ACP tidak boleh digunakan oleh pemohon untuk mengetepikan Borang JA; dan (e) tindakan BYG kepada JR adalah pramatang kerana ia tidak melaksanakan hak rayuannya di bawah ACP.

Diputuskan, menolak permohonan kebenaran:

(1) BYG menganggap bahawa responden telah membuat keputusan apabila ia tidak menerima jawapan dalam tempoh akhir yang dinyatakan dalam suratnya. Berdasarkan kes perundangan, ia perlu ada keterangan jelas tentang keengganan untuk bertindak. Dalam kes semasa, BYG telah mengenakan kewajipan undang-undang ke atas responden untuk membuat keputusan apabila tiada kewajipan sedemikian ke atas responden di bawah s 135 ACP. Oleh itu, ketidakjawaban responden terhadap surat BYG tidak terjumlah kepada satu keputusan yang boleh dipinda oleh semakan kehakiman (lihat perenggan 12 & 15–17).

(2) Mahkamah tidak boleh bersetuju bahawa permohonan kebenaran adalah remeh dan menyusahkan hanya kerana KPHDN tidak dijadikan pihak dalam prosiding tersebut. Mahkamah berpuas hati bahawa permohonan JR dibuat terhadap 'keputusan' responden untuk tidak membalas atau menjawab surat BYG (lihat perenggan 19 & 21).

(3) Seksyen 135 ACP tidak mengenakan kewajipan undang-undang ke atas

responden untuk mengetepikan notis taksiran KPHDN di bawah ACP. Oleh itu, BYG tidak boleh mendapatkan perintah mandamus untuk memaksa responden berbuat demikian (lihat perenggan 27).

(4) Seksyen 135 ACP memperuntukkan bahawa Menteri boleh memberi arahan kepada KPHDN yang bersifat umum yang tidak bercanggah dengan ACP, manakala s 127(3A) ACP membenarkan Menteri mengecualikan mana-mana orang daripada semua atau mana-mana peruntukan ACP, sama ada secara umum atau berkenaan dengan mana-mana jenis pendapatan tertentu atau mana-mana kelas pendapatan tertentu. Kedua-dua seksyen tersebut memberi Menteri budi bicara dalam hal-hal yang berkaitan dengan cukai secara amnya. Walau bagaimanapun, mereka tidak, pada pandangan mahkamah, membenarkan Menteri untuk mengecualikan pembayar cukai daripada membayar cukai yang perlu dan kena dibayar pada dan apabila Menteri berkenan. Jika keadaan sedemikian wujud, ia akan menimbulkan huru-hara kepada keseluruhan rangka kerja perundangan percukaian. Ia akan menjadi sia-sia untuk KPHDN mengeluarkan notis taksiran jika Menteri boleh dengan mudah mengecualikan pembayar cukai daripada mematuhinya (lihat perenggan 30, 32 & 35).

(5) Permohonan JR BYG adalah pramatang kerana ia mempunyai hak merayu di bawah s 99 ACP untuk mencabar Borang JA yang dikeluarkan oleh KPHDN. Undang-undang memperuntukkan tindakan rayuan kepada Pesuruhjaya Khas Cukai Pendapatan di bawah s 99 ACP dihabiskan terlebih dahulu (lihat perenggan 37 & 41).]

Cases referred to

Abdul Rahman bin Abdullah Munir & Ors v Datuk Bandar Kuala Lumpur & Anor [2008] 6 MLJ 704, CA (refd)

Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association [1990] 3 MLJ 228; [1990] 1 CLJ Rep 33, SC (refd)

Berjaya Times Square Sdn Bhd v Menteri Kewangan Malaysia [2023] MLJU 261, HC (refd)

Dell Global Business Center Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2021] MLJU 1580; [2021] 10 CLJ 411, HC (refd)

Karpal Singh Ram Singh v Ketua Hakim Negara [2011] 4 CLJ 179, HC (refd)

Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 1 MLJ 563, FC (refd)

Lock Wee Kock v Menteri Hal Ehwal Dalam Negeri & Anor [1993] 3 MLJ 691, SC (refd)

Oriental Assembler Sdn Bhd v Menteri Kewangan & Anor [2018] MLJU 930; [2018] 1 LNS 975, HC (refd)

Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor [2011] 2 MLJ 457, FC (refd)

Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor [2009] 1 MLJ 555, CA (refd)
WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296; [2012] 4 CLJ 478, FC (refd)
Winsome Al-Yatama Sdn Bhd v Pentadbir Tanah Kota Tinggi [2015] MLJU 711, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 25(2), Schedule, para 1
Income Tax Act 1967 ss 99, 127(3A), 135
Rules of Court 2012 O 53, O 53 rr 2(4), 3(1)

S Saravana Kumar (with Felicia Wong Sie Ying) (Rosli Dahlan Saravana Partnership) for the applicant.
Krishna Priya a/p Veenagopal @ Venugopal (Federal Counsel, Attorney General's Chambers) for the respondent.

Shahnaz Sulaiman J:

INTRODUCTION

[1] This is an application by the applicant, BYG Architecture Sdn Bhd seeking leave of this court to commence an application for judicial review under O 53 r 3(1) of the Rules of Court 2012 ('the ROC 2012'). The reliefs sought by the applicant are, among others, are reproduced below:

(a) that the applicant be granted leave of this honorable court to file an application for:

(i) an order for the respondent to exercise its power under s 135 and/or s 127(3A) of the Income Tax Act 1967 ('the ITA') to give directions to the Director General of Inland Revenue's ('DGIR') to set aside or exempt the notice of additional assessment ('Forms JA') for the year of assessment ('YAs') 2018, 2019, 2020 and 2021 all dated 16 December 2022, which is deemed served on the applicant on 19 December 2022 ('decision'), on the grounds that the said Forms JA were ultra vires, illegal, void, unlawful and/or in excess of authority, irrational and/or unreasonable and made without having any regard to the applicant's legitimate expectations; and

(ii) a declaration that the applicant is exempted from paying any income tax its foreign source income for the YAs 2018, 2019, 2020 and 2021 due to the applicability of the para 28 of Schedule 6 of the Income Tax Act 1967 ('the ITA');

(b) that all further proceedings include the enforcement of the Forms JA be stayed until the full and final determination of the judicial review application;

(c) that all necessary and consequential directions and orders be given; and

(d) that the costs of this application be costs in the cause.

OBJECTION BY THE ATTORNEY GENERAL

[2] The honorable attorney general objected to this application for leave on the following grounds:

(a) no decision, act or omission was made by the respondent (Minister of Finance) under O 53 of the Rules of Court 2012;

(b) the notice of assessment raised by DGIR who was not named as a party to this action;

(c) the applicant's relief is in effect a mandamus however the applicant failed to establish legal duty;

(d) ss 135 and 127(3A) of the Income Tax Act 1967 ('the ITA') does not have nexus to set aside the notice of assessment issued by DGIR; and

(e) the applicant circumvented and failed to exhaust the domestic remedy provided under the ITA.

BRIEF FACTS

[3] The applicant sent a letter dated 3 October 2022 to YB Minister of Finance ('the respondent') to express the applicant's concern and dissatisfaction with the DGIR's decision to raise the notice of additional assessment dated 14 April 2022, 2 March 2022, 5 September 2022 and 26 September 2022 tax due and payable by the applicant for year of assessment ('YA') period 2015–2021 (Form JA).

[4] As a result of the applicant's dissatisfaction with the DGIR's decision, the applicant requested the respondent to give the DGIR directions under s 135 of the ITA and/or exempt the taxes raised under s 127(3A) of the ITA 1967.

PRINCIPLES RELATING TO LEAVE FOR JUDICIAL REVIEW

[5] The guiding principles for leave for judicial review is that the applicant must show prima facie that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application. In this regard, the case of *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296; [2012] 4 CLJ 478 stated as follows:

> [12] For purposes of its application, the appellant had alluded to the statutory route of O 53 of the Rules. Under this order two stages are anticipated, with the leave stage being the first, to be followed closely by the substantive hearing after successfully

obtaining leave at the High Court. At the leave stage on a quick perusal of the material available, if the court thinks that subsequently at the substantive hearing stage an arguable case may be disclosed, and the relief sought may be granted, leave should be granted (*IRC v National Federation of Self-Employed and Small Business Ltd* [1982] AC 617). In Malaysia, the Federal Court in *Mohamed Nordin bin Johan v Attorney-General, Malaysia* [1983] 1 MLJ 68; [1983] 1 CLJ 130; [1983] CLJ Rep 271 when allowing the appeal, opined that 'the point taken was not frivolous to merit refusal of leave in limine and justified argument on a substantive motion for certiorari'. Without the need to go into depth of the abundant authorities, suffice if we stage that leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though ie, unless the matter for judicial review is amenable to judicial review absolutely no success may be envisaged.

[6] The Supreme Court in *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228; [1990] 1 CLJ Rep 33 (SC) stated the requirement for the application to challenge an Industrial Court award to show, prima facie, that it is not frivolous or vexatious and there is substance in the proposed challenge. The Supreme Court stated:

At the outset of the hearing of the appeal before us, we indicated to the parties that we would hear submissions on the issue of leave only ... The guiding principles ought to be that the applicants must show prima facie that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application. On the evidence in this case we found that the appellants had prima facie an arguable case for the granting of the relief they were seeking. Their application was not frivolous or vexatious. There were grounds to consider the allegations made by the appellants and which could only be properly heard and determined on the substantive application for an order of certiorari after leave has been granted.

[7] Founded on the principles enunciated in the authorities stated above, this court will consider the application for leave.

ANALYSIS AND FINDINGS

[8] This court will proceed to examine the objections raised by the learned federal counsel on behalf of the honourable attorney general.

No decision, act or omission was made by the respondent under O 53 of the ROC 2012

[9] The learned federal counsel for the attorney general submitted that there was no decision by the respondent which would be amendable to judicial review.

[10] The facts before this court are that the applicant had via letter dated 3 October 2022 to the respondent requested the respondent to give the DGIR direction under s 135 of the ITA to direct the DGIR to review its exercise of power and functions. The applicant in the same letter sought the applicant to grant a tax exemption to the respondent in respect of tax payable and penalty raised under s 127(3A) of the ITA (see exh YGB18 of encl 3). Exhibit YGB18 went on to further state that the respondent sought the respondent to give the DGIR directions by 10 October 2022. In the event there was no reply from the respondent by 10 October 2022, the applicant stated it assumed the respondent's office rejecting the applicant's request.

[11] The issue before this court therefore is whether when a reply was not received by the applicant within the time dictated by the applicant by way of letter dated 3 October 2022, it amounted to a decision. To consider this objection, this court alluded to O 53 r 2(4) of the ROC 2012 which reads:

> 4 Any person who is adversely affected by the *decision, action or omission* in relation to the existence of the public duty or function shall be entitled to make the application. (Emphasis added.)

[12] The applicant in this case deemed that the respondent had made a decision when no reply was forthcoming from the respondent within the timeline imposed by the applicant.

[13] In this regard, this court referred to the High Court case of *Winsome Al-Yatama Sdn Bhd v Pentadbir Tanah Kota Tinggi* [2015] MLJU 711 where Mohd Nazlan bin Mohd Ghazali JC had elaborated on this issue. For ease of reference, the relevant paragraphs are reproduced below:

> [23] The question is whether the non-response by the respondent to the letter of the applicants dated 13 January 2015 by the deadline specified by them on 9 February 2015 can be considered as a form of decision, the act or omission in respect of which can legally attract the public law remedies of judicial review. It is trite law as emphasised by the Federal Court in *Members of the Commission of Enquiry on the Video Clip Recording of Images of A Person Purported to be an Advocate and Solicitor Speaking on Telephone on Matters of Appointment of Judges v Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim* [2011] 6 MLJ 490; [2012] 1 CLJ 805, following *Council of Civil Service Unions v Minister for Civil Service* [1984] 3 All ER 935 that *for a decision to be susceptible to judicial review, there must first be a decision by a decision maker or a refusal by him to make a decision, and that decision must affect the aggrieved party*.
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> [24] The parties before me at the hearing did not specifically submit on this point. Following my review of the law on the matter, I shall refer first to the case of *Re Bukit Sembawang Rubber Co Ltd v Sembawang Estates Ltd* [1961] MLJ 269 (*Sembawang Rubber*). In this case, an order of mandamus was issued against the Collector of Land Revenue who failed to make an award after the enquiry under s 10 of the Land Acquisition Ordinance, initially for about three months and then after citing a

government freeze on budget for development projects, for another three and a half years until the applicant wrote to the collector. *The High Court stated that as a general rule, mandamus will not be granted unless it is shown by evidence that there was a distinct demand which the party seeking the mandamus desires to enforce and that that demand was met by a refusal.* The following part of the judgment on this point is of relevance to the instant case:

> According to the cases that have been cited, a refusal may be an absolute refusal in terms or there may be conduct amounting to a refusal. Where the respondent has not refused compliance in express terms it is a question of fact whether his conduct evinces a clear determination not to comply.
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> In *R v The Brecknock and Abergavenny Canal Company* 111 ER 395, Lord Denham CJ says (at p 397):
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> > We cannot grant a mandamus unless there has been a direct refusal; and here, I think, there has not. It is not indeed necessary that the word refuse, or any equivalent to it, should be used; but there should be enough to shew that the party withholds compliance, and distinctly determines not to do what is required. (Emphasis added.)

[14] Abdul Hamid Embong JCA in the case of *Abdul Rahman bin Abdullah Munir & Ors v Datuk Bandar Kuala Lumpur & Anor* [2008] 6 MLJ 704 stated as follows:

> [59] ... We also find it ludicrous for the appellants to hold the view that a decision was only arrived at when the first respondent failed to respond to one week time period ultimatum in their letter. The latter was not duty-bound to respond to what we feel, corresponded to a threat.

[15] Hence, did the absence of a reply from the respondent to the applicant's letter amount to a decision by the respondent. The applicant contends it is a deemed decision. Based on the cases cited above, it is the considered view of this court that there must be a clear evidence of a refusal to act. In this application for judicial review, the applicant had imposed a duty on the respondent to make a decision where one did not exist.

[16] Section 135 of the ITA provides for the respondent to give directions to the DGIR as follows:

> The Minister may give to the Director General directions of a general character (not inconsistent with this Act) as to the exercise of the functions of the Director General under this Act; and the Director General shall give effect to any directions so given.

[17] This court is of the considered view that s 135 of the ITA does not impose a legal duty to the respondent. This court is therefore satisfied the non-response by the respondent to the applicant's letter dated 3 October 2022 does not amount to a decision that is amendable to judicial review.

The notice of assessment raised by DGIR who is not named as a party to this action

[18] The respondent in this application for judicial review is the Minister of Finance. The DGIR was not named as a party to this judicial review.

[19] The learned federal counsel submitted that by not naming the DGIR this action is indeed frivolous and vexatious because the whole matter boils down to the assessment raised by DGIR hence, the assessment by DGIR is the decision that the applicant is dissatisfied with.

[20] This application for judicial review is against the non-reply or non-response of the respondent to the applicant's letter seeking the respondent to give to the DGIR directions under s 135 of the ITA and/or exempt the taxes raised under sub-s 127(3A) of the ITA.

[21] The directions sought are to be given to the DGIR and the taxes sought to be exempted are raised by the DGIR. Nonetheless, this court is satisfied that the application for judicial review is against the non-reply or non-response of the respondent to the applicant's letter. This is the 'decision' the applicant has now brought this application for judicial review. This court respectfully does not agree with the contention of the learned federal counsel on this objection.

The applicant's relief in effect a mandamus however the applicant failed to establish legal duty

[22] The attorney general objected that the applicant in not entitled for a relief to compel the respondent to set aside the notice of assessment issued by DGIR dated 14 July 2021 as the respondent has no legal duty to do so. The applicant's prayer 1(a) of encl 1 reads as follows:

> Suatu perintah bagi responden untuk menggunakan kuasanya di bawah s 135 dan/atau s 127(3A) Akta Cukai Pendapatan 1967 ('ACP') untuk memberikan arahan-arahan kepada Ketua Pengarah Hasil Dalam Negeri ('KPHDN') mengetepikan atau mengecualikan notis-notis taksiran tambahan ('Borang-Borang JA') bagi tahun taksiran ('TT') 2018, 2019, 2020 dan 2021 semuanya bertarikh 16 Disember 2022 yang dianggap diserahkan kepada Pemohon pada 19 Disember 2022 ('keputusan') atas alasan-alasan bahawa Borang-Borang JA tersebut adalah ultra vires, haram (*illegal*), tidak sah (*void*), menyalahi undang-undang (*unlawful*) dan/atau melebihi kuasa (in excess of authorithy), tidak rasional (*irrational*) dan/atau tidak munasabah (*unreasonable*) dan telah dibuat tanpa mengambil kira jangkaan sah pemohon.

[23] This court's jurisdiction to grant an order of mandamus is based on sub-s 25(2) of the Courts of Judicature Act 1964 which reads:

Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule: Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

[24] Additionally, para 1 of the Schedule to the Courts of Judicature Act 1964 (Act 91) reads:

Prerogative writs

1 Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

[25] With regard to the granting of mandamus, in the case of *Karpal Singh Ram Singh v Ketua Hakim Negara* [2011] 4 CLJ 179 Aziah Ali J had stated:

[16] Mandamus can be granted only when a legal duty is imposed on an authority. In MP Jain, *Administrative Law of Malaysia and Singapore* (3rd Ed) at pp 652–653 it is stated:

> The order of mandamus is a command issued by the High Court asking an authority to perform a public duty imposed upon it by law ... Mandamus can be granted only when: (i) a legal duty is imposed on an authority, and it does not perform the same; and (ii) the applicant has a legal right to compel the performance of the public duty prescribed by law.
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> What can be enforced through mandamus is a duty of a public nature, the performance of which is imperative and not optional or discretionary with the concerned authority. Thus, if an officer has power, rather than a duty, and if he does not use his power, mandamus is not issued to compel him to exercise his power.

[26] The applicant seeks an order to compel the respondent to set aside the notice of additional assessment issued by the DGIR dated 16 December 2022. The question therefore is whether a legal duty exists for this court to grant a writ of mandamus.

[27] Section 135 of the ITA, in the view of this court does not impose a legal duty on the respondent. The applicant therefore cannot compel the respondent to set aside the notice of additional assessment issued by DGIR dated 16 December 2022. This is because there is no legal duty on the respondent to set aside the notice of assessment under ITA. What exists is the discretion of the respondent. The respondent is not obligated to set aside the notice of assessment.

[28] In this regard, this court agrees with the objection by the learned federal counsel for the attorney general.

Sections 135 and 127(3A) does not have nexus to set aside the notice of assessment issued by DGIR

[29] Section 135 of the ITA reads:

> The Minister may give to the Director General directions of a general character (not inconsistent with this Act) as to the exercise of the functions of the Director General under this Act; and the Director General shall give effect to any directions so given.

[30] A reading of s 135 of the ITA plainly provides that the Minister may give the DGIR directions of a general character which is not inconsistent with the ITA. In this application for judicial review, the applicant in the letter dated 3 October 2022 urged the respondent to exercise his power under s 135 of the ITA. Section 135 is designed to allow the Minister to give the DGIR directions of a general character. The applicant's letter urging the respondent to give the DGIR directions pertaining to the assessment of tax, in the considered view of this court, cannot be viewed to be directions of a general character as provided in s 135 of the ITA. Moreover, s 135 requires such direction of the Minister to the DGIR not to be inconsistent with the ITA. In this application for judicial review, this court is satisfied that s 135 of the ITA cannot be employed for the respondent to give directions to the DGIR.

[31] The applicant had sought to challenge the respondent's deemed decision when the respondent did not reply to the applicant's request for an exemption under sub-s 127(3A) of the ITA. The applicant had by way of letter dated 3 October 2022 sought for an exemption. This is evident from para 24 of exh YGB18 as follows:

> 24. As the DGIR has failed to take into account the nature of the business income of the Company and has misapplied the law, we humbly request Yang Berhormat Mulia pursuant to Section 135 of the ITA to direct the DGIR to review its exercise of power and functions so that the law is applied correctly and fairly.

[32] Subsection 127(3A) of the ITA reads as follows:

> (3A) The Minister may, in any particular case exempt any person from all or any of the provision of this Act, either generally or in respect of any income of a particular kind or any class of income of a particular kind.

[33] Subsection 127(3A) of the ITA allows the Minister to exempt any person generally or in respect of any income of a particular kind or any class of income.

[34] A reading of s 135 and sub-s 127(3A) of the ITA plainly allows the Minister discretion. The word 'may' connotes a non-mandatory nature. In *Lock Wee Kock v Menteri Hal Ehwal Dalam Negeri & Anor* [1993] 3 MLJ 691

Justice Eusoff Chin, Supreme Court judge clearly stated that:

> The significance of such a provision in the Interpretation Act will remind the legal draftsman to always confine the use of the word 'shall' to its mandatory sense, in contrast to the use of the word 'may' which denotes a permission or discretion.

[35] Both s 135 and sub-s 127(3A) of the ITA give the Minister a discretion on matters pertaining to tax generally. This could include exempting a particular class of income. These provisions do not, in the considered view of this court, allow the Minister to exempt a taxpayer from paying the tax due as and when the Minister pleases. If such a situation were to come into being, it would create chaos to the whole taxation legislative framework. What would be the point of the DGIR issuing notice of assessments when it could be easily exempted by the Minister? In this case, the applicant itself had written to the respondent, urging, if not insisting the Minister to allow the applicant's appeal to the Minister.

[36] This court therefore agrees with the submission of the learned federal counsel that ss 135 and 127(3A) does not have nexus to set aside the notice of assessment issued by the DGIR.

The applicant circumvented and failed to exhaust the domestic remedy provided under the ITA

[37] The applicant in this present application challenged the applicant's notice of assessment issued by the DGIR dated 16 December 2022 for the years of assessment 2018, 2019, 2020 and 2021 to the applicant. The applicant has a right of appeal in law under s 99 of the ITA.

[38] In *Dell Global Business Center Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2021] MLJU 1580; [2021] 10 CLJ 411. The court stated the following:

> [23] The principles governing the alternative remedy issue is well-settled and are as enunciated by the Supreme Court in *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185; [1987] 1 CLJ 451 ('Jagdis Singh'), which is incidentally a tax case.
>
> [24] The ratio decidendi of the Supreme Court is stated in the following paragraphs of the judgment:
>
> > ... it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review. *Judicial review is always at the discretion of the court but where there are other avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances*.
> >
> > ... we would therefore hold that the discretion is still with the courts but *where there is an appeal provision available to the applicant certiorari should not normally*

issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice. (Emphasis added.)

[39] There are numerous cases on this question of whether an applicant should exhaust the domestic remedy available before making an application for judicial review. Cases have decided that the applicant is not entitled to initiate a judicial review proceedings against the respondent as the applicant had failed to exhaust the statutory appeal procedure available (see *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 1 MLJ 563; *Oriental Assembler Sdn Bhd v Menteri Kewangan & Anor* [2018] MLJU 930; [2018] 1 LNS 975; *Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor* [2009] 1 MLJ 555 (Court of Appeal); *Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2011] 2 MLJ 457).

[40] The ITA provides for the Special Commissioner for Income Tax to provide a specific avenue for aggrieved parties to air their grievances. Before this court, there is no information as to whether the applicant had brought the applicant's grievance to the Special Commissioner of Income Tax.

[41] This court is of the considered view that the applicant's application for judicial review is premature. The law provides for an avenue to appeal to be exhausted first before the Special Commissioners of Income Tax pursuant to s 99 of the ITA.

CONCLUSION

[42] In conclusion, this court can do no better than to cite Amarjeet Singh J in *Berjaya Times Square Sdn Bhd v Menteri Kewangan Malaysia* [2023] MLJU 261 as reproduced bellow:

> [17] The opening words of the first principal relief are: 'an order for the Minister to exercise his powers'. The powers referred to are housed in ss 135 and 127(3A) of the ITA. The use of such word is to compel the Minister to exercise the said powers and, in the manner, dictated by the applicant. The said order is therefore in substance an order in the nature of mandamus. It is certainly not an order for certiorari. It is trite that an order of certiorari is to quash the legal effect of a decision and this is not made out by the words employed in the relief sought. I have considered the submissions and agree with the federal counsel that the order as framed is an order in the nature of mandamus which cannot in law be granted on the face of what had been pleaded by the applicant. As such, there is no arguable case for the first principal order to be investigated at the substantive stage.
>
> ...
>
> [29] The incontrovertible fact show that the Minister did not make any decision

and did not reply to the applicant's letter. There is no therefore no nexus between the grounds raised in the order statement and the relief of certiorari, given the fact that the Minister as decision-maker did not make a decision. The grounds the applicant raised in the O 53 statement seeks to quash a fictitious decision. As such, no arguable case for investigation at the substantive stage is made out and one which is fair to say is also frivolous and vexatious.

... The non-applicability of ss 135 and 127(3A) of the ITA

[36] Again, it is important to keep in mind the following crucial facts: (i) that the Minister did not make a decision in respect of the applicant's request; and (ii) that the assessment made by DGIR are illegal and/or unlawful ie the tax cannot be levied in law. The applicant came to the Minister to set aside the assessment made by the DGIR by way of directions to the DGIR to set aside the same or to exempt the tax as assessed by the DGIR.

[37] In my view, the Minister has no power to do what the applicant is requesting him to do under ss 135 and/or 127(3A) of the ITA. As such, there is no arguable case for investigation at the substantive stage for the reliefs prayed or not prayed for ie mandamus, certiorari and declaration on the material presented to this court ...

...

[42] In the instant case, the applicant is claiming to be exempted, not from lawfully determined tax but from illegally and/or unlawfully levied tax. That is not the purpose of s 127(3A) of the ITA. Unlawfully levied tax is the jurisdiction of the Special Commissioners. As such, s 127(3A) of the ITA is only applicable where there is liability to pay lawfully assessed tax. Therefore the exemption sought in the instant case is something that the Minister has no power of doing (see also *Sime Darby Property (Selangor) Sdn Bhd v Menteri Kewangan Malaysia* [2023] MLJU 260; [2023] MLRHU 190).

[43] For the aforementioned reasons, and having considered the authorities cited, this court dismisses this application for leave to commence judicial review proceedings. Costs of RM10,000 to be paid subject to allocator.

Leave application dismissed.

Reported by Ashok Kumar